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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/582,550

10/06/2008

Jacqueline Rachel Day

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PHILADELPHIA, PA 19103-2307

EXAMINER

NGUYEN, TRINH T

ART UNIT

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3644

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PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/582,550	<b>Applicant(s)</b> DAY ET AL.	
	<b>Examiner</b> Trinh T. Nguyen	<b>Art Unit</b> 3644	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on RCE dated 4/5/10.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 27-52 is/are pending in the application.
- 4a) Of the above claim(s) 40-52 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 27-39 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948)                        | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Continued Examination under 37 CFR 1.114 After Final Rejection***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 4/5/10 has been entered.
2. Newly submitted claims 40-52 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: the newly submitted claims 40-52 is directed to method claims while the originally claims 1-26 is directed to apparatus claims. Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 40-52 have been withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

### ***Claim Rejections - 35 USC § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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4. Claims 27,28,30,31,33,34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Robohm (US 6557492) in view of Smolski (US 3452966).

For claim 27, Robohm teaches an apparatus for storing aquatic animals, comprising a tank (205) for receipt of a plurality of aquatic animals, said tank having an upper portion and a lower portion; and means for delivering foam (310) to the interior of the tank.

However, Robohm lacks to mention that the means for delivering foam to the interior of the tank at the upper portion.

Smolski teaches that it is old and well known in the art of animal husbandry to use a means (14,13) for delivering bubble/foam within a body of liquid at the upper portion (see Figure 1). It would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the apparatus of Robohm so as to include the use of a means for delivering bubble/foam within a body of liquid at the upper portion, in a similar manner as taught in Smolski, so as to promote a better fluid recirculation arrangement.

Furthermore, it should be noted that a recitation (i.e., "at least a majority of the aquatic animals when stored in the tank are submerged in foam") of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. Presently, the Robohm reference provides the claimed structure (i.e., a tank having a means for delivering foam to the interior of the tank), and is therefore,

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capable of functioning (i.e., storing aquatic animals within the tank wherein the aquatic animals are submerged in the foam) as claimed.

For claim 28, Robohm as modified by Smolski (emphasis on Smolski) further teach the means for delivering foam comprises: means (13,14) for circulating a liquid in said tank from the lower portion of the tank to the upper portion of the tank; and means for injecting a gas/air into said circulating means such that bubble/foam is generated in said circulating means (see lines 54-60 of col. 2).

For claim 30, Robohm as modified by Smolski disclose most of the claimed invention except for mentioning the gas/air injecting means comprises means for introducing a property-enhancing substance into the foam. However, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the apparatus of Robohm as modified by Smolski so as to have included the gas/air injecting means comprises means for introducing a property-enhancing substance into the foam, since the Examiner takes Official Notice that such concept is old and well known technique used throughout the art of transporting live aquatic animals so as to prolong the life of aquatic animals store therein.

For claim 31, Robohm as modified by Smolski disclose most of the claimed invention except for mentioning the gas/air injecting means comprises means for pulsing the gas/air as the gas/air is injected into the circulating means whereby the foam can be applied over the aquatic animals in pulses. However, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the apparatus of Robohm as modified by Smolski so as to have included the

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gas/air injecting means comprises means for pulsing the gas/air as the gas/air is injected into the circulating means whereby the foam can be applied over the aquatic animals in pulses, since the Examiner takes Official Notice that such concept is old and well known technique used throughout the art of transporting live aquatic animals so as to efficiently supply amount of gas/air into the tank and thus prolong the life of aquatic animals store therein.

5. Claims 29 and 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over the references (Robohm in view of Smolski) as applied to claim 28 above, and further in view of Holman (US 1616125).

For claim 29, as described above, the references (Robohm in view of Smolski) as applied to claim 28 above teach most of the claimed invention except to mention that the gas/air injecting means comprises a source of pressurized gas/air.

Holman teaches that it is old and well known in the art of transporting live aquatic animals to use a gas/air injecting means comprises a source of pressurized gas/air. It would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified the apparatus of the references (Robohm in view of Smolski) as applied to claim 28 above so as to include the use of a gas/air injecting means comprises a source of pressurized gas/air, in a similar manner as taught in Holman, so as to constantly supply gas/air therein and thus promote a better fluid recirculation arrangement and prolonging the life of aquatic animals store within.

For claim 32, the references (Robohm in view of Smolski) as applied to claim 28 above as modified by Holman (emphasis on Smolski) further teach the means for

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delivering foam to the interior of the tank comprises: a fluid conduit (13) extending from the lower portion of the tank to the upper portion of the tank, and means for introducing a pressurized gas/air into the fluid conduit so as to generate a vacuum to suck fluid (24) from the lower portion of the tank and deliver fluid to the upper portion of the tank via the fluid conduit (see Figure 1). Furthermore, it should be noted that a recitation (i.e., “whereby the fluid can be applied as a foam over at least a majority of the aquatic animals when stored in the tank”) of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. Presently, the Robohm reference provides the claimed structure (i.e., a tank having a means for delivering foam to the interior of the tank), and is therefore, capable of functioning (i.e., storing aquatic animals within the tank wherein the fluid can be applied as a foam over at least a majority of the aquatic animals) as claimed.

***Claim Rejections - 35 USC § 102***

6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

7. Claims 35-38 are rejected under 35 U.S.C. 102(b) as being anticipated by Lyngstad (US 2005/0076848).

For claim 35, an apparatus for storing aquatic animals, comprising a tank (14) for receipt of a plurality of aquatic animals, and

means (46,50,54,58,68,70,72,74,76,78,80 see [0038],[0039],[0040]) for recirculating fluid from a lower region of the interior of the tank in which the aquatic animals are stored to an upper region of the interior of the tank, such that the fluid passes over at least a majority of the aquatic animals when stored in the tank and the natural proteins of the aquatic animals create a foam (it is inherently that aquatic animals such as bivalves produce/release some sort of natural proteins in a form of foam) as the fluid is recirculated, whereby at least a majority of the aquatic animals when stored in the tank are submerged in foam.

For claim 36, Lyngstad teaches means (74,76) for injecting a gas/air into said recirculating means such that foam/air is generated in said recirculating means.

For claim 37, Lyngstad teaches the gas injecting means comprises a source of pressurized gas (74, see [0040]).

For claim 38, Lyngstad teaches the gas injecting means comprises means for introducing a property-enhancing substance (salt and/or pH, see [0040]) into the foam.

8. Claim 39 is rejected under 35 U.S.C. 103(a) as being unpatentable over Lyngstad (US 2005/0076848).

As described above, Lyngstad discloses most of the claimed invention except for mentioning the gas/air injecting means comprises means for pulsing the gas/air as the gas/air is injected into the circulating means whereby the foam can be applied over the aquatic animals in pulses. However, it would have been obvious to one of ordinary skill



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in the art at the time the invention was made to have modified the apparatus of Lyngstad so as to have included the gas/air injecting means comprises means for pulsing the gas/air as the gas/air is injected into the circulating means whereby the foam can be applied over the aquatic animals in pulses, since the Examiner takes Official Notice that such concept is old and well known technique used throughout the art of transporting live aquatic animals so as to efficiently supply amount of gas/air into the tank and thus prolong the life of aquatic animals store therein.

### ***Response to Arguments***

9. Applicant's arguments dated 4/5/10 have been considered but are moot in view of the new ground(s) of rejection.

### ***Conclusion***

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Trinh T. Nguyen whose telephone number is (571) 272-6906. The examiner can normally be reached on M-F (9:30 P.M to 6:00 P.M).

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Mansen can be reached on (571) 272-6608. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Trinh T Nguyen/  
Primary Examiner, Art Unit 3644